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IN THE

Supreme Court of the United States

OCTOBER TERM—1932—NO. 286

THE NEW YORK CENTRAL RAILROAD COMPANY,
as owner of the carfloat "No. 37",

Petitioner-Libellant,

—against—

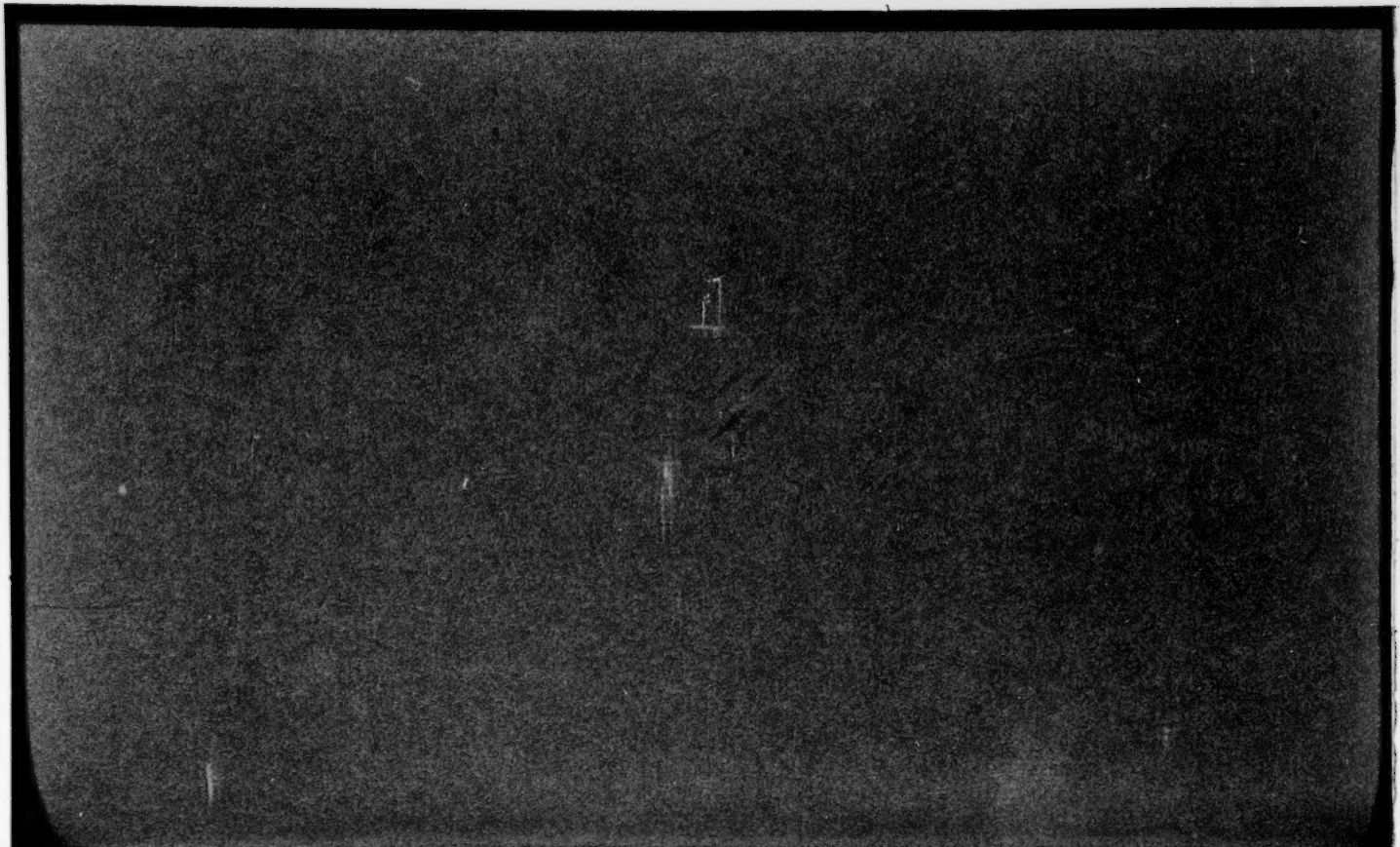
Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Claimant-Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.



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IN THE

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OCTOBER TERM, 1932.

THE NEW YORK CENTRAL RAILROAD COMPANY,
as owner of the carfloat "No. 37",
Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,
Claimant-Respondent.

Petition.

Your petitioner, The New York Central Railroad Company, owner of carfloat "No. 37", respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order entered April 11, 1932 (R. 34), reversing the decree of the United States District Court for the Southern District of New York and its order entered May 12, 1932 (R. 40-41), denying petitioner's petition for a rehearing. The opinion of the Circuit Court of Appeals (R. 29-34) is officially reported at 57 F. (2d) 144. The original opinion of the District Court (R. 15-18) is officially reported at 52 F. (2d) 691.

The Nature of the Case.

This suit was instituted by the petitioner as owner of carfloat New York Central "No. 37" to recover damages

for injury sustained by that vessel while lying moored at float bridge No. 6 at the terminal of the Long Island Railroad Company at Long Island City, N. Y. as a result of being struck by another carfloat which was brought into collision with the "No. 37" by respondent's tug "Talisman". It was agreed by the parties:

(a) That the collision and consequent damage were occasioned solely by reason of negligence of the tug "Talisman" (Stipulation of Facts, §1, R. 12);

(b) That the petitioner and the respondent were, at the time of this accident, common carriers engaged in interstate commerce, and that the respondent received petitioner's carfloat "No. 37" at the respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation of Facts, §3, R. 12-13);

(c) That more than four years prior to the accident in question, the libellant received by registered mail from the claimant, a certain notice dated July 31, 1920, pleaded by respondent as a bar to this action (Answer, R. 10) and made no reply thereto, such notice reading as follows:

> "We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.
>
> On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equip-

ment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn.

Yours very truly,

H. L. DES ANGES,
Marine Superintendent."

(Stipulation of Facts, §5, R. 13-14).

The respondent contended in the District Court and in the Circuit Court of Appeals that the Long Island Railroad Company was relieved of liability for damage to libellant's float by its notice of July 31, 1920, and that the act of the petitioner in sending its float to the Long Island Railroad Terminal for the interchange of traffic in interstate commerce, constituted an agreement to the notice and a contract exempting the Long Island Railroad Company from liability for the damage sustained by float "No. 37".

The District Court (Knox, *D. J.*), held that as both petitioner and respondent were common carriers engaged in transportation in interstate commerce, and the petitioner in the discharge of the duty which it owed to the public was compelled to send its floats to the terminal which the respondent was required by law to main-

tain for the interchange of interstate traffic and, further, that inasmuch as the respondent was under an obligation to receive such freight as might be delivered to the terminal by petitioner, the petitioner's proper and usual facilities for carrying freight to the terminal were entitled to common law protection from negligent acts of the respondent during such reasonable periods of time as they were on respondent's property, and that the respondent's notice was a mere *ipse dixit* in an effort to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic with another carrier and was ineffective (Opinion, R. 18).

The Circuit Court of Appeals, reversing the District Court, held that the notice of the Long Island Railroad Company gave the terms upon which the respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 31). It held further that such an agreement was authorized under Sec. 3, par. 4 of the Interstate Commerce Act, authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal facilities" to any other carrier on such terms and for such compensation as the carriers may agree upon or as the Commission may fix as just and reasonable. The court therefore held that the case was within the doctrine of its decisions in the cases of *Ten Eyck* vs. *Director General* (C. C. A. 2), 267 F. 974, certiorari denied, 254 U. S. 646; *The Cutchogue,* (C. C. A. 2) 10 F. (2d) 671; *Sun Oil Company* v. *Dalzell Towing Company Inc** (C. C. A. 2), 55 F. (2d) 63 (R. 31).

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* A writ of certiorari has now been granted by this Court in the *Sun Oil Company* case, May 23, 1932, and that case is now on the calendar of this Court for argument at the October Term, 1932.

The Circuit Court of Appeals therefore reversed the decree of the District Court and directed that the petitioner's libel be dismissed.

The Questions Presented.

1. *Can a carrier engaged in interstate commerce and maintaining a terminal, including floating bridges, for the receipt, delivery and interchange of freight in interstate commerce, exclude from its terminal, carfloats of a connecting carrier engaged in interstate commerce and impose on such connecting carrier terms, including an exemption from liability for negligent injury to the floating equipment of such connecting carrier, as a condition of allowing such floating equipment to receive or discharge freight in course of transit in interstate commerce, at its terminal?*

2. *Did the petitioner, by sending its carfloat to The Long Island Railroad Terminal for the purpose of interchanging traffic in interstate commerce, thereby make a valid contract with the respondent The Long Island Railroad Company exempting the respondent from liability for damage sustained by petitioner's carfloat while at respondent's terminal as the result of respondent's negligence IN THE OPERATION OF OTHER FLOATING EQUIPMENT owned and operated by the respondent?*

The decision of the Circuit Court of Appeals is based on the proposition that "when the New York Central sent its carfloat there, it must be regarded as having accepted the offer to receive it upon the terms indicated" (R. 31).

The decision presupposes that the Long Island Railroad had a right to state "terms" on which it would

agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to exclude the New York Central carfloat from its terminal unless the conditions were accepted.

The Circuit Court of Appeals further said:

> "* * * the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 33).

The decision therefore assumes that the petitioner, although a connecting carrier, engaged in the service of the public in interstate commerce, with freight to discharge and receive at the Long Island Terminal, could decline to send its carfloat to that terminal if it was dissatisfied with the terms on which the Long Island Railroad Company was willing to permit the New York Central carfloat to discharge and receive freight at the Long Island Terminal.

We submit that both assumptions of the Circuit Court of Appeals are indefensible and that, if sustained, the decision will lead to chaotic conditions.

Moreover, the Circuit Court of Appeals was quite in error in assuming that this case involves such a use of the terminal facilities of one carrier as the Interstate Commerce Commission is authorized to require by another carrier and for which use it is empowered to fix terms under the provisions of the Interstate Commerce Act (U. S. Code, Tit. 49, Chap. 1, Sec. 3, Par. 4).[1] Such a use of terminal facilities is illustrated by such an outstanding example as the use of Grand Central Terminal, its tracks and facilities at New York City, owned by The New York Central Railroad Company, by the

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[1] Printed Appendix, p. 27.

New York, New Haven & Hartford Railroad Company *for the latter's own business* and on a rental basis, or the use of the Union Station at Cleveland (see *Pittsburgh & W. Railway Co.* v. *U. S.*, 41 F. (2d) 806). The essential characteristic of the use of terminal facilities contemplated by Sec. 3, Par. 4, is the use of the terminal facilities of one carrier by another *for the latter's own business*[1] for which use compensation and terms are evidently proper. Plainly the intent of Par. (4) was not to authorize one carrier to impose terms on another as a condition of doing business with that other as a connecting carrier in interstate commerce. That situation is controlled by Par. (3),[2] which *requires* all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

The New York Central in sending its float to the Long Island Terminal was not making use of the terminal facilities of the Long Island Railroad for its own business, but was sending its float to the terminal for the interchange of traffic in interstate commerce for which purpose the Long Island was bound to afford "reasonable and proper facilities".

Consequently the Circuit Court of Appeals was in error in suggesting that petitioner's remedy is by application to the Interstate Commerce Commission to fix "the terms" on which The New York Central might be entitled to facilities for the interchange of traffic with the Long Island Railroad (R. 33). That commission has no power or authority to fix such terms.

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[1] This is brought out plainly by the initial condition expressed in the statute that such use shall not impair the ability of the "carrier owning or entitled to the enjoyment of terminal facilities *to handle its own business*".

[2] Printed Appendix, p. 27.

Since it is plain that the respondent could not refuse to receive the petitioner's carfloat, or to afford reasonable facilities for the interchange of traffic, or impose terms as a condition of so doing, and since it is plain also that the petitioner was obliged to send its float to respondent's terminal for the exchange of traffic, it is clear that no contract exempting the respondent from liability can be spelled out. The respondent had no consideration to offer for such a contract and the act of petitioner in sending its float is shorn of any significance as an acceptance of the respondent's "terms", for petitioner's act was not voluntary, but an obligatory part of its public duty.

The decision of the Circuit Court of Appeals is definitely in conflict with the applicable local decisions. The identical question here presented was decided with exactly the opposite result in the state courts of New York State in the case of *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474 (City Court of the City of New York, affirmed Appellate Term, without opinion, leave to appeal to Appellate Division denied). The decision of Judge Valente in *The Patchogue* was fully approved and followed in the District Court in this case by Judge Knox, who quoted at length from the opinion (R. 49). The Circuit Court of Appeals did not attempt to distinguish and, in fact, ignored the decisions of the courts of New York State on the identical question.

Furthermore, the decision of the Circuit Court of Appeals, in sustaining the attempt of the Long Island Railroad Company to impose a contract on the petitioner exempting the respondent from liability for negligence, is in conflict with the decisions of this Court and with the circuit courts of appeal in other circuits. This Court has refused to recognize the validity of

similar contracts relating to towing in its decisions in the *Steamer Syracuse,* 12 Wall. 167, and *Compania de Navegacion* v. *Fireman's Fund Ins. Company* (*The Wash Gray*), 277 U. S. 63. In the case of *Sun Oil Company,* petitioner v. *Dalzell Towing Company, Inc.,* respondent, Supreme Court of the United States, October Term, 1931, No. 874, this court granted a writ of certiorari on May 23, 1932, to the Circuit Court of Appeals for the Second Circuit to review its decision sustaining such a contract relating to the furnishing of a pilot in connection with a towage agreement. The decision of the Circuit Court of Appeals in the *Sun Oil Company* case was cited by that Court, among others, as authority for its decision in this case (R. 31). In the petition for certiorari filed in the *Sun Oil Company* case, it was pointed out that the decision of the Circuit Court of Appeals for the Second Circuit in that case is in conflict with the decisions of this court in the cases cited, *supra,* and of the federal courts in the 1st, 4th, 5th and 9th Circuits in the following cases:

The Somers N. Smith (D. C. Me.), 120 Fed. 569;

The Monarch (D. C. Fla.), 235 Fed. 795;

Mylroie v. *British Columbia Mills Tug & Barge Co.* (C. C. A. 9), 268 Fed. 449;

The Sea Lion (D. C. Cal.), 12 F. (2d) 124;

United States v. *Norfolk-Berkley Bridge Corp. et al.* (E. D. Va.), 29 F. (2d) 115;

Calzavaro v. *Planet S. S. Corp. et al.* (C. C. A. 4), 31 F. (2d) 885.

Although the cases cited relate to contracts to tow or to furnish a pilot, we submit that there is no ground for distinction between those cases and the

present. If any, the difference is favorable to the petitioner's position here. Petitioner in dealing with respondent, as a connecting carrier, was in the same position as any other member of the public dealing with a common carrier.

> *Atchison T. & S. F. Railroad Co.* v. *Denver, etc. R. Co.*, 110 U. S. 667;
> 10 Corpus Juris, Carriers 563, s. 938.

As pointed out by the State Court in the case of *The Patchogue, supra,* 126 Misc. (N. Y.) 474, 478:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani* v. *Wilson,* 188 App. Div. 626."

Judge Knox in the District Court took the same view in the present case, saying:

> "Furthermore, claimant was under an obligation to receive such freight as might be delivered to the terminal by libellant; and, during such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 18).

Moreover, the decisions of this Court in *The Syracuse* and *Compania de Navegacion* cases, *supra,* show clearly that any such notice as that relied upon by the respondent here must be construed most strictly against the respondent and that no contract exempting the respond-

ent from negligence will be spelled out unless the same is proven clearly and beyond any question. We call attention to the fact that the notice in this case applied "to all floating equipment *lying at Long Island Railroad Company Terminals*" (R. 13). We submit that this notice should be construed to be limited to carfloats "lying at Long Island Railroad Company Terminals" beyond "such reasonable periods of time", in the language of Judge Knox, as required for the interchange of traffic. Such use of the respondent's terminal facilities beyond the reasonable period required for the interchange of interstate traffic has not been shown by the respondent in this case and consequently, as so interpreted, the notice has not been shown to be applicable and cannot be sustained as a defense.

As a matter of fact even if it is considered that petitioner was making use of the terminal facilities of the respondent at the time of this accident, the injury to petitioner's carfloat was in no way related to, or a risk of, that use. It was merely a circumstance that the float was lying in the float bridge when injured by the respondent through negligence in the operation of *other floating equipment*. The petitioner's float was lawfully in the float bridge and the rules governing respondent's liability should be no different than if the collision had occurred while the float was in mid-river. Surely respondent would not be permitted to claim exoneration from liability for such a collision, as a condition of petitioner's float being permitted to lie at its terminal.

We submit that no valid contract exempting the respondent from liability under the circumstances of this case was shown; that the decision of the Circuit Court of Appeals is wrong, and should be reviewed by this Court.

Reasons for Allowance of Writ.

1. The decision of the Circuit Court of Appeals authorizing a common carrier engaged in interstate commerce to impose terms on another as a condition of the normal interchange of traffic, and impliedly recognizing the right of such carrier to refuse to afford reasonable facilities for the interchange of traffic with its connecting carrier except upon its proposed terms, and of the connecting carrier to refuse to interchange traffic unless such terms are withdrawn, is a question of public interest and importance of widespread application and of far reaching results if the decision of the Circuit Court of Appeals is allowed to stand.

2. The decision of the Circuit Court of Appeals involves a misinterpretation and a misapplication of Chap. I, Sec. 3, par. 4 of the Interstate Commerce Act, which has not been, but should be, authoritatively interpreted by this Court.

3. The decision of the Circuit Court of Appeals is diametrically opposed to the decisions of the courts of the State of New York on the identical question.

4. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *The Syracuse* and the *Compania de Navegacion* (Wash Gray) cases, *supra*, is in conflict with the decisions of the federal courts in other circuits, cited *supra*, and is based in part on its own decision in the case of *Sun Oil Company* v. *Dalzell Towing Company Inc.*, 55 F. (2d) 63, which this Court has undertaken to review by granting a petition for a writ of certiorari.

5. The decision of the Circuit Court of Appeals has decided an important question of general law in a way

probably untenable and in conflict with the weight of authority.

We submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered on its docket No. 274, October Term, 1931, and entitled "The New York Central Railroad Company, as owner of the carfloat 'No. 37', Libellant-Appellee vs. the tug 'Talisman', The Long Island Railroad Company, Claimant-Appellant"; and that the decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court as herein prayed for; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE NEW YORK CENTRAL RAILROAD COMPANY,

By D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1932.

THE NEW YORK CENTRAL RAILROAD COMPANY,
as Owner of the carfloat "No. 37",
Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,
Claimant-Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The facts are fully stated in the petition. These suits are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction is invoked under Tit. 28, chap. 347, U. S. Code, as amended by the Act of February 13, 1925, 43 Stat. 938 and under Art. 3, §2 of the Constitution of the United States.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In reversing the decision of the District Court in favor of the libellant on stipulated facts and in reversing the interlocutory decree entered by the District Court in favor of the libellant.

2. In holding that when The New York Central sent its carfloat to the Long Island Railroad Terminal it must be regarded as having accepted the offer of the respondent Long Island Railroad Company to receive such carfloat upon terms exempting the respondent from the liability for negligent injury to petitioner's float while at respondent's terminal.

3. In holding that the petitioner entered into a valid contract with the respondent exempting the respondent from liability for negligent injury to petitioner's float under the circumstances of this case.

4. In holding that the Long Island Railroad Company furnished good consideration for such a contract.

5. In holding that the respondent was free to make such conditions as to liability as it thought desirable as a condition to receiving petitioner's carfloat at its terminal.

6. In holding that the petitioner in sending its carfloat to the Long Island Railroad Terminal in connection with the transportation of freight cars and freight in interstate commerce was making a use of the respondent's terminal facilities within the meaning of the provisions of tit. 49, Sec. 3, par. 4, U. S. Code for which, by the provisions of such section, the Interstate Commerce Commission is authorized to fix terms and compensation.

7. In holding that the petitioner could have appealed to the Interstate Commerce Commission if it did not wish to agree to the terms proposed by the respondent and in failing to do so freely agreed upon such terms.

POINT I.

Respondent furnished petitioner only those reasonable facilities for the interchange of traffic required by the provisions of the Interstate Commerce Act as to which it could impose no conditions or terms. There was no consideration to support a contract and no act of petitioner constituting an agreement to the proposed "conditions".

The respondent relies upon an affirmative defense, that is, a contract to exempt it from liability for the results of its admitted negligence. The legal situation is exactly stated in the diametrically opposed decision of Judge Valente in the State Court in *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, which was ignored by the Circuit Court of Appeals:

> "It is not proven that plaintiff agreed to this letter, which, so far as appears, was a unilateral and voluntary communication by the defendant company, unacceded to, and unapproved by the plaintiff company. The burden emphatically, therefore, rests upon defendant to prove that the terms of this letter are legally authorized by law and juridically effective between the respective parties" (p. 476).

The section of the Interstate Commerce Act (Chap. 1, sec. 3, par. 3)—requiring the respondent to afford to the petitioner, as a connecting carrier, reasonable and proper facilities for the interchange of traffic—is printed herewith, Appendix, p. 27. The petitioner and the respondent are connecting carriers. It is stipulated that at the time of the accident petitioner's carfloat was lying

in the respondent's float bridge and had been there received by the respondent in connection with the transportation in interstate commerce of freight cars and freight (R. 12, 13). The interests of the parties in the through transportation of freight was mutually exclusive. The New York Central's interest in the contract of transportation ceased upon the transfer of the cars from its float to the Long Island tracks at the bridge and vice versa. The petitioner made no use of the respondent's tracks or terminal facilities. It merely placed its float at the bridge so that a transfer of cars and freight from one line to the other might be made. The respondent had no more right to exclude the petitioner's carfloat from entering its float bridge for this interchange of traffic than it would have to exclude an individual or a public drayman from the loading platform of any of its stations for the purpose of doing business with the respondent. No more could it impose terms or conditions.

The Circuit Court of Appeals ignored par. 3, *supra*, and fell into the error of assuming that the petitioner in sending its float to the respondent's float bridge was making a use of the respondent's terminal facilities such as is provided for in Interstate Commerce Act, Chap. 1, sec. 3, par. 4 (Printed Appendix, p. 27), which might be required of one carrier for the benefit of another and for which use the commission is empowered to fix terms (R. 32, 33).

The Court said:

> "We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatis-

fied with them. It contracted without an appeal to the Commission. * * * It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right" (R. 33).

But the use of terminal facilities contemplated by par. 4 is the use of such facilities belonging to one carrier by another *for its own business.* This is plainly shown by the statutory condition at the outset of the section that such use may be ordered when "practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities *to handle its own business*". This section has been recently construed with respect to the Union Terminal at Cleveland, *Pittsburg and W. Ry. Co. v. U. S.* 41 Fed. (2d) 806, affirmed 281 U. S. 479. No such use of the respondent's terminal facilities for the petitioner's business was offered by respondent or accepted by the petitioner in this case. There was only an interchange of traffic whereby business accepted by one carrier for through transportation became the business of the other upon transfer from petitioner's float to respondent's tracks or vice versa. No authority is granted to the Interstate Commerce Commission by the act to fix terms or conditions for such interchange. On the contrary, under par. 3, respondent was obliged to afford all reasonable and proper facilities for such interchange.

We submit, therefore, that the petitioner, not desiring

to be bound by the conditions propounded by the respondent, acted properly in ignoring the notice and the conditions which the respondent had no right to propose. An appeal to the Interstate Commerce Commission under par. 4, such as suggested by the Circuit Court of Appeals, would have been inappropriate, for that section was totally inapplicable. We submit that the decision of the State Court in *The Patchogue* and of the District Court below were right in holding that the respondent offered the petitioner only the facilities it was bound to offer and that there was no consideration to support a contract.

On the other hand, it is equally true that the act of the petitioner in sending its float to the respondent's terminal was not voluntary and was consequently of no significance as an indication of its acceptance of the respondent's proposed conditions. As Judge Knox pointed out:

> "The libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 18).

Similarly, *The Patchogue*, 126 Misc. (N. Y.) 474, 477.

The cases relied upon by the Circuit Court of Appeals, *Ten Eyck* v. *Director General*, 267 F. 974, and *The Cutchogue*, 10 F. (2d) 671 (R. 33), are quite inapplicable. In each of those cases the respondent offered to furnish a service (towage) which it was not, in any event, bound to furnish. The libellant was a free agent not for any reason required to accept the service offered. The libellant in accepting the respondent's offer in those cases, of course,

accepted the offer as made, including the conditions attached. In those cases the libellant's voluntary act could fairly be regarded as an acceptance of the offer. In this case the libellant's act was obligatory and involuntary and consequently of no significance as an acceptance. The essential elements of a contract were, therefore, totally lacking.

POINT II.

The contract which respondent attempted to impose upon petitioner was in no event a valid contract exonerating respondent from liability for negligent injury to petitioner's carfloat under the circumstances of this case.

The State Court in ruling on the identical defense of the respondent in a case involving another connecting carrier said:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani Bros., Inc.* v. *Wilson Sons & Co., Ltd.*, 188 App. Div. 617, 620."
>
> *B. & O. R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. (N. Y.) 474, 478 (City Court of the City of New York, decision affirmed Appellate Term—leave to appeal to Appellate Division denied).

The foregoing excerpt from the decision of the City

Court was quoted with approval by Judge Knox in the District Court in this case (R. 17), who added:

> "During such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 18).

This Court in *The Syracuse,* 12 Wall. 167, 171, dealing with an attempt to exonerate a tugboat from liability for negligent injury to her tow by reason of an alleged contract, said:

> "Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

That decision was followed and elaborated by this Court in *Compania de Navegacion* v. *Fireman's Fund Ins. Company,* 277 U. S. 66.

This Court's decision in *The Syracuse* has been taken by the Courts of the First, Fourth, Fifth and Ninth Circuits to mean that a tugboat is not allowed by law to avoid by a contract the consequences of its own negligence:

> *Mylroie* v. *British Columbia Mills Tug & Barge Co.,* 268 Fed. 449, 451-2 (C. C. A. 9);
> *The Somers N. Smith,* 120 Fed. 572, 576;
> *The Monarch,* 235 Fed. 795, 799 (D. C. Fla);

The Sea Lion, 12 F. (2d) 124 (D. C. Cal.);
U. S. v. *Norfolk-Berkley Bridge Corp., et al.*, 29 F. (2d) 115, 118 (E. D. Va.);
Calzavaro v. *Planet S. S. Corp., et al.*, 31 F. (2d) 885 (C. C. A. 4).

The contrary view has been taken in the Second Circuit—

The Oceanica (C. C. A. 2), 170 Fed. 893;
Ten Eyck v. *Director General*, 267 Fed. 974 (C. C. A. 2);
The Cutchogue, 10 F. (2d) 671 (C. C. A. 2).

and the view of the Circuit Court of Appeals for the Second Circuit has been adopted by the District Court for the District of Georgia in the Fifth Circuit:

The Pacific Maru, 8 F. (2d) 166.

Following its view in the towage cases, the Circuit Court of Appeals for the Second Circuit has held valid a provision for exemption from liability for negligence in a contract to furnish pilotage in connection with a towage service—

Sun Oil Company v. *Dalzell Towing Co. Inc.* (C. C. A. 2), 55 F. (2d) 63

But, as already noted, this Court has granted a writ of certiorari to review the decision of the Circuit Court of Appeals in that case and argument will be heard at the coming term.

We submit that the reasons for holding that the respondent is not allowed by law to avoid by contract the consequences of its own negligence under the circumstances of this case, are more compelling even than in the towage cases. Petitioner, as a connecting carrier,

was dealing with the respondent on the same basis as any other member of the public and had the same rights—

A. T. & S. F. R. R. Co. v. *Denver etc. R. Co.*, 110 U. S. 667.

Certainly any member of the travelling public, having lawful business which requires him to enter or approach the terminal of a public carrier, is entitled to common law protection against injury by negligent act of the carrier, and a notice posted on the premises notifying the public that the carrier will not be liable for negligent injury to persons visiting its terminal on lawful business would certainly be held ineffective. We submit that this is exactly what the respondent has attempted in this case and what the Circuit Court of Appeals has upheld, and that the attempted contract sought to be imposed by the respondent on the libellant should, in no event, be held valid.

It is clear, moreover, that in any event the proposed contract must be most strictly construed against the respondent and that any doubt should be resolved in favor of the petitioner——

B. & O. R. R. Co. v. *L. I. R. R. Co.*, 126 Misc. (N. Y.) 474, 478;
McCaffrey's Sons v. *Director General of Railroads* (D. C. N. Y.), 282 Fed. 728

The respondent's notice is with respect to floating equipment "lying at Long Island Railroad Company Terminals" (R. 16). Carfloats and other craft frequently lie at respondent's terminal for considerable periods of time before they are removed. It is stipulated that petitioner's carfloat was "moored in bridge No. 6" (R. 12) "in connection with transportation in interstate

commerce of freight cars and freight" (R. 13). We submit that a distinction can, and should, be drawn between floats moored in the float bridge for interchange of freight, and floats lying at the terminal beyond such reasonable periods of time as required for proper interchange of freight. The respondent has not shown that the petitioner's float lay at the terminal beyond such reasonable period of time. In fact, on the contrary, the stipulation shows that the float was actively engaged in the business for which it was sent to the terminal at the time the damage was inflicted

Moreover, as pointed out in the petition (p. 11) the injury to petitioner's float by respondent's negligence in the operation of other floating equipment was not a risk connected with or arising out of any use by petitioner of respondent's terminal. The petitioner's float was lawfully at the terminal and the legal situation is no different than if respondent's tug had run down petitioner's carfloat while in the river en route to the terminal. Respondent's notice should not be so construed as to include an injury so unrelated to a normal use of respondent's terminal and, if so construed, clearly should be held invalid.

We submit, therefore, that the contract which the respondent attempted to impose on the libellant was neither valid nor applicable to the circumstances of this case.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the question pre-

sented involving the relations of connecting carriers in interstate commerce, the misconstruction by the Court of the provisions of the Interstate Commerce Act, the conflict between the decisions in the State and Federal Courts on the particular question involved, and the conflict between the courts in different circuits as to the validity of the contract attempted to be imposed, which subject this Court has already called up for review in the case of *Sun Oil Company* v. *Dalzell Towing Company, Inc., supra.*

Respectfully submitted,

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Appendix A.

EXTRACTS FROM INTERSTATE COMMERCE ACT, U. S. CODE, TIT. 49, SEC. 3, PARS. 3 & 4.

(3) INTERCHANGE OF TRAFFIC. All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) TERMINAL FACILITIES; USE OF AND COMPENSATION FOR. If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately

secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, c. 104, §3, 24 Stat. 380; Feb. 28, 1920, c. 91, §405, 41 Stat. 479; Mar. 4, 1927, c. 510, §1, 44 Stat. 1447.)